

W. H. B. v.  
Culver Franchising

JURY INSTRUCTIONS GIVEN

13C 3269

Durkin

AP

Members of the jury, you have seen and heard all the evidence and arguments of the attorneys. Now I will instruct you on the law.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in the case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow these instructions, even if you disagree with them. Each of the instructions is important, and you must follow all of them.

Perform these duties fairly and impartially. Do not allow sympathy, prejudice or public opinion to influence you. You should not be influenced by any person's race, color, religion, national ancestry, or sex.

Nothing I say now, and nothing I said or did during the trial, is meant to indicate any opinion on my part about what the facts are or about what your verdict should be.

**FILED**

JUN 08 2016

Judge Thomas M. Durkin  
United States District Court

During this trial, I asked witnesses several questions myself. Do not assume that because I asked questions I hold any opinion on the matters I asked about, or on what the outcome of the case should be.

It is proper for a lawyer to meet with any witness in preparation for trial.

Certain things are not to be considered as evidence. I will list them for you:

First, if I told you to disregard any testimony or exhibits or strike any testimony or exhibits from the record, such testimony or exhibits are not evidence and must not be considered.

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded. This includes any press, radio, Internet, Social Media, or television reports you may have seen or heard. Such reports are not evidence and your verdict must not be influenced in any way by such publicity.

Third, questions and objections or comments by the lawyers are not evidence. Lawyers have a duty to object when they believe a question is improper. You should not be influenced by any objection, and you should not infer from my rulings that I have any view as to how you should decide the case.

Fourth, the lawyers' opening statements and closing arguments to you are not evidence. Their purpose is to discuss the issues and the evidence. If the evidence as you remember it differs from what the lawyers said, your memory is what counts.

Finally, the lawyers were allowed to give you interim statements. At various times during trial, I allowed the lawyers to briefly tell you about the evidence you had already heard or that they expected you to hear. These interim statements are not evidence.



Any notes you took during this trial are only aids to your memory. The notes are not evidence. If you did not take notes, you should rely on your independent recollection of the evidence and not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than the recollections or impressions of each juror about the testimony.

You will not receive transcripts of the testimony that you heard during the trial.

The evidence consisted of the testimony of the witnesses, the exhibits admitted in evidence, and stipulations.

A stipulation is an agreement between both sides that certain facts are true.

During the trial, certain testimony was presented to you by the reading or video playback of a deposition. You should give this testimony the same consideration you would give it had the witness appeared and testified here in court.

You should use common sense in weighing the evidence and consider the evidence in light of your own observations in life.

In our lives, we often look at one fact and conclude from it that another fact exists. In law we call this "inference." A jury is allowed to make reasonable inferences. Any inference you make must be reasonable and must be based on the evidence in the case.

You may have heard the phrases “direct evidence” and “circumstantial evidence.” Direct evidence is proof that does not require an inference, such as the testimony of someone who claims to have personal knowledge of a fact. Circumstantial evidence is proof of a fact, or a series of facts, that tends to show that some other fact is true.

As an example, direct evidence that it is raining is testimony from a witness who says, “I was outside a minute ago and I saw it raining.” Circumstantial evidence that it is raining is the observation of someone entering a room carrying a wet umbrella.

The law makes no distinction between the weight to be given to either direct or circumstantial evidence. You should decide how much weight to give to any evidence. In reaching your verdict, you should consider all the evidence in the case, including the circumstantial evidence.

You must decide whether the testimony of each of the witnesses was truthful and accurate, in part, in whole, or not at all. You also must decide what weight, if any, you give to the testimony of each witness.

In evaluating the testimony of any witness, including any party to the case, you may consider, among other things:

- the ability and opportunity the witness had to see, hear, or know the things that the witness testified about;
- the witness's memory;
- any interest, bias, or prejudice the witness may have;
- the witness's intelligence;
- the manner of the witness while testifying;
- and the reasonableness of the witness's testimony in light of all the evidence in the case.

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a larger number. You need not accept the testimony of the larger number of witnesses.

The law does not require any party to call as a witness every person who might have knowledge of the facts related to this trial. Similarly, the law does not require any party to present as exhibits all papers and things that will be mentioned during this trial.



You heard witnesses give opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way that you judge the testimony of any other witness. The fact that such person gives an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness's qualifications, and all of the other evidence in the case.

Certain diagrams, maps and other demonstrative exhibits were shown to you. Those exhibits were used for convenience and to help explain the facts of the case. They are not themselves evidence or proof of any facts.

Unless admitted into evidence, they will not be given to you in the jury room when you deliberate.

The following types of materials were submitted into evidence.

charts and graphs showing sales and transactions at Culver's locations;  
charts showing distance and population densities between Culver's locations;  
charts summarizing data from Culver's Franchise Disclosure Documents  
from 2003-2016; and  
tables of census data.

It is up to you to decide if the summaries are accurate.

You may consider statements given by a party or a witness under oath before trial as evidence of the truth of what he or she said in the earlier statements, as well as in deciding what weight to give his or her testimony.

With respect to other witnesses, the law is different. If you decide that, before the trial, one of these witnesses made a statement not under oath or acted in a manner that is inconsistent with his or her testimony here in court, you may consider the earlier statement or conduct only in deciding whether his or her testimony here in court was true and what weight to give to his or her testimony here in court.

In considering prior inconsistent statements or conduct, you should consider whether it was simply an innocent error or an intentional falsehood and whether it concerns an important fact or an unimportant detail.

In determining whether any fact has been proved, you should consider all of the evidence bearing on the question regardless of who introduced it.

In this case some of the parties are companies. All parties are equal before the law. A company is entitled to the same fair consideration that you would give any individual person.

You must give separate consideration to each claim and each party in this case. Although there are two plaintiffs, Michael Wilbern and Wilbern Enterprises, it does not follow that if one is successful that the other must be too.

When I say a particular party must prove something by “a preponderance of the evidence,” or when I use the expression “if you find,” or “if you decide,” this is what I mean: When you have considered all the evidence in the case, you must be persuaded that it is more probably true than not true.



In this case, Plaintiffs Michael Wilbern and Wilbern Enterprises have made claims under the Federal Civil Rights statute that prohibits discrimination in the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Specifically,

(1) Michael Wilbern claims that he was denied the opportunity to open a Culver's franchise at Marshfield Plaza because of his race; and

(2) Wilbern Enterprises claims that it was denied the right to choose Stony Island rather than Franklin Park as the location for its Culver's franchise because of the race of its principal, Michael Wilbern.

Defendant denies that Plaintiffs were discriminated against in any way.

I will now instruct you more fully on the issues you must address in this case.

Plaintiff Michael Wilbern claims that he was discriminated against by Defendant Culver Franchising System, Inc. (CFSI) because of his race. Michael Wilbern alleges that CFSI discriminated against him in the denial of the right to make and enter into contracts as is enjoyed by white persons who enter into similar contracts with CFSI, and including discrimination in the making of contracts.

To succeed on this claim, Michael Wilbern must prove by a preponderance of the evidence that CFSI's actions caused Michael Wilbern's alleged harms. CFSI's actions were not a cause of Michael Wilbern's alleged harms if Michael Wilbern would have suffered the same harms in the absence of CFSI's conduct.

To succeed on this claim, Michael Wilbern must also prove by a preponderance of the evidence that it was subjected to this treatment by CFSI because of Michael Wilbern's race. To determine that Michael Wilbern was subjected to this treatment by CFSI because of Michael Wilbern's race, you must decide that CFSI would not have subjected Michael Wilbern to the treatment described above had Michael Wilbern not been African American but everything else had been the same.

If you find that Plaintiff Michael Wilbern has proved this by a preponderance of the evidence, then you must find for Michael Wilbern. However, if you find that Michael Wilbern did not prove this by a preponderance of the evidence, then you must find for Defendant CFSI.

You may not return a verdict for Michael Wilbern just because you might disagree with CFSI's decision or believe it to be harsh or unreasonable, if you find that decision was not based on race.

Plaintiff Wilbern Enterprises claims that it was discriminated against by Defendant Culver Franchising System, Inc. (CFSI) because of Michael Wilbern's race. Wilbern Enterprises alleges that CFSI discriminated against it in the denial of the right to make and enter into contracts as is enjoyed by white persons who enter into similar contracts with CFSI, and including discrimination in the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

To succeed on this claim, Wilbern Enterprises must prove by a preponderance of the evidence that CFSI's actions caused Wilbern Enterprises' alleged harms. CFSI's actions were not a cause of Wilbern Enterprises' alleged harms if Wilbern Enterprises would have suffered the same harms in the absence of CFSI's conduct.

To succeed on this claim, Wilbern Enterprises must also prove by a preponderance of the evidence that it was subjected to this treatment by CFSI because of Michael Wilbern's race. To determine that Wilbern Enterprises was subjected to this treatment by CFSI because of Michael Wilbern's race, you must decide that CFSI would not have subjected Wilbern Enterprises to the treatment described above had Michael Wilbern not been African American but everything else had been the same.

If you find that Plaintiff Wilbern Enterprises has proved this by a preponderance of the evidence, then you must find for Wilbern Enterprises. However, if you find that Wilbern Enterprises did not prove this by a preponderance of the evidence, then you must find for Defendant CFSI.

You may not return a verdict for Wilbern Enterprises just because you might disagree with CFSI's decision or believe it to be harsh or unreasonable, if you find that decision was not based on race.

If you find that Plaintiffs have proved any of their claims against Defendant, then you must determine what amount of damages, if any, Plaintiffs are entitled to recover as to that claim. Plaintiffs must prove their damages by a preponderance of the evidence.

If you find that Plaintiffs have failed to prove any of their claims, then you will not consider the question of damages as to that claim or claims.

You may award compensatory damages to Plaintiff Michael Wilbern only for injuries that Michael Wilbern proved by a preponderance of the evidence were caused by Defendant's wrongful conduct.

Your award must be based on evidence and not guesswork. This does not mean, however, that compensatory damages are restricted to the actual loss of money; they include both the physical and mental aspects of injury, even if they are not easy to measure.

As to Michael Wilbern you should consider the following types of compensatory damages, and no others:

1. The profits lost at a potential franchise located at Marshfield Plaza as a result of Defendant's wrongful conduct, and
2. Damages for the mental and emotional pain and suffering he experienced due to the Defendant's wrongful conduct. No evidence of the dollar value of mental and emotional pain and suffering has been or needs to be introduced. There is no exact standard for setting the damages to be awarded on account of pain and suffering. You are to determine an amount that will fairly compensate Michael Wilbern for the injury he has sustained.

You may award compensatory damages to Plaintiff Wilbern Enterprises only for injuries that Wilbern Enterprises proves by a preponderance of the evidence were caused by Defendant's wrongful conduct.

Your award must be based on evidence and not guesswork. Wilbern Enterprises's compensatory damages will be limited to the actual loss of money because a corporation is unable to experience pain and suffering.

You should consider the following types of compensatory damages, and no others:

1. The net profits lost at a franchise located at Stony Island rather than Franklin Park as a result of Defendant's wrongful conduct
2. Outstanding expenses owed by Wilbern Enterprises to creditors arising from the Franklin Park restaurant.



Both Michael Wilbern and Wilbern Enterprises claim that they have suffered lost profits as the result of discriminatory treatment by Culver Franchising System.

Lost profits damages provide compensation for any profits proved to have been denied to the respective Plaintiff as a consequence of unlawful discrimination by the Defendant in this case. You may award lost profit damages if you find that lost profits would have been earned if Defendant had not engaged in the alleged discrimination. To recover lost profits for those restaurants that were never opened, Plaintiffs must prove that the restaurant would have opened for business and, that the restaurant would have been profitable if Defendant had not engaged in discrimination.

Plaintiffs are not required to prove the exact amount of lost profits that they would have earned. If you have a reasonable basis for estimating the amount of the loss, you may award lost profits, but if you do not have a reasonable basis for estimating the amount of the loss, you may not award lost profits. Damages for lost profits may not be based on what the Plaintiffs hoped or guessed their profits would have been, but you should not deny the recovery of lost profits merely because the exact amount of the loss or harm is difficult to determine.

Defendant argues that Michael Wilbern's claim for lost profit damages should be reduced by the profits he would have earned by opening a different restaurant at his desired locations.

If you find that,

1. Michael Wilbern did not take reasonable actions to reduce his damages, and
2. Michael Wilbern reasonably might have found comparable profits if he had opened a different restaurant,

then you should reduce any amount you might award Michael Wilbern for lost profits by the amount Michael Wilbern reasonably would have earned during the period for which you are awarding lost profit damages.

Defendant must prove both that the reduction should be made and its amount.



Defendant argues that Wilbern Enterprises' claims for damages should be reduced by the profits it would have earned by taking on a partner and/or by opening another type of restaurant and/or negotiating a resolution with its landlord earlier.

If you find that,

1. Wilbern Enterprises did not take reasonable actions to reduce its damages, and
2. Wilbern Enterprises reasonably might have found comparable profits if it had taken on a partner, or opened a different type of restaurant, or reduced its outstanding expenses by negotiating a resolution with its landlord earlier,

then you should reduce any amount you might award Wilbern Enterprises for damages by the amount Wilbern Enterprises reasonably would have reduced its damages during the period for which you are awarding damages.

Defendant must prove both that the reduction should be made and its amount.

The law that applies to this case on Plaintiffs' claims authorizes an award of nominal damages. If you find for Wilbern and/or Wilbern Enterprises but you find that either or both of these Plaintiffs has failed to prove damages as defined in these instructions, you must award nominal damages. Nominal damages may not exceed one dollar. Punitive damages may be awarded even if you award only nominal damages.

If you find for Michael Wilbern and/or Wilbern Enterprises you may, but are not required to, assess punitive damages against Defendant. The purposes of punitive damages are to punish a defendant for its conduct and to serve as an example or warning to the defendant and others not to engage in similar conduct in the future.

Michael Wilbern and/or Wilbern Enterprises must prove by a preponderance of the evidence that punitive damages should be assessed against Defendant. You may assess punitive damages only if you find that the conduct of Defendant's officers and managerial employees was in reckless disregard of the rights of Michael Wilbern and/or Wilbern Enterprises. An action is in reckless disregard of the rights of Michael Wilbern and/or Wilbern Enterprises if taken with knowledge that it may violate the law.

Michael Wilbern and/or Wilbern Enterprises must prove by a preponderance of the evidence that some or all of Defendant's officers and managerial employees acted within the scope of their employment and in reckless disregard of Plaintiffs' rights not to be discriminated against.

In determining whether any persons were managerial employees of Defendant, you should consider the kind of authority Defendant gave them, the amount of discretion they had in carrying out their job duties, and the manner in which they carried them out. You should not, however, award Michael Wilbern or Wilbern Enterprises punitive damages if Defendant proves that it made a good faith effort to implement an antidiscrimination policy.

If you find that punitive damages are appropriate, then you must use sound reason in setting the amount of those damages. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes that I have described to you, but should not reflect bias, prejudice, or sympathy toward either/any party. In determining the amount of any punitive damages, you should consider the following factors:

- (i) the reprehensibility of Defendant's conduct;
- (ii) the impact of Defendant's conduct on Michael Wilbern and/or Wilbern Enterprises;
- (iii) the relationship between Michael Wilbern and/or Wilbern Enterprises and Defendant;
- (iv) the likelihood that Defendant would repeat the conduct if an award of punitive damages is not made;
- (v) Defendant's financial condition;

- (vi) the relationship of any award of punitive damages to the amount of actual *damages*
- (vii) harm that Michael Wilbern and/or Wilbern Enterprises suffered.

Upon retiring to the jury room, you must select a presiding juror. The presiding juror will preside over your deliberations and will be your representative here in court.

Forms of verdict have been prepared for you.

[Forms of verdict read.]

Take these forms to the jury room, and when you have reached unanimous agreement on the verdict, your presiding juror will fill in, date, and sign the appropriate form, and all of you will sign it.

I do not anticipate that you will need to communicate with me. If you do need to communicate with me, the only proper way is in writing. The writing must be signed by the presiding juror, or, if he or she is unwilling to do so, by some other juror. The writing should be given to the marshal, who will give it to me. I will respond either in writing or by having you return to the courtroom so that I can respond orally.

If you do communicate with me, you should not indicate in your note what your numerical division is, if any.

The verdict must represent the considered judgment of each juror. Your verdict, whether for or against the parties, must be unanimous.

You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views, and listen to the opinions of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to reexamine your own views and change your opinion if you come to believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of other jurors or for the purpose of returning a unanimous verdict.

All of you should give fair and equal consideration to all the evidence and deliberate with the goal of reaching an agreement that is consistent with the individual judgment of each juror. You are impartial judges of the facts.